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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1270

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

COMMISSIONER OF REVENUE,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Respondent, Commissioner of Revenue of the State of Minnesota, opposes the granting of a writ of certiorari herein on the grounds that the petition does not present a substantial federal question.

QUESTION PRESENTED

Was petitioner Associated Dry Goods Corporation carrying on a business wholly within the state of Minnesota that was so separate from and unrelated to the rest of its business, or businesses, that the apportionment of its total net income to Minnesota by the three-factor formula violated the Fourteenth Amendment, or, was it carrying on a unitary business within and without the state of Minnesota so that such apportionment of its total net income to Minnesota did not contravene the Fourteenth Amendment?

In short, was petitioner carrying on a unitary business within and without the state of Minnesota during the tax years 1955 through 1967?

STATEMENT OF THE CASE

Petitioner, Associated Dry Goods Corporation, is a Virginia corporation with its principal office in New York City. Petitioner is engaged in the retail merchandising business, and operates store divisions in a number of states. See Petition, Appendix D. Petitioner is duly qualified to do business in Minnesota, and operates its Powers Dry Goods division in Minnesota. For the tax years 1955 through 1967, petitioner filed its Minnesota income tax returns on the separate accounting basis. By his order dated April 17, 1970, the Commissioner of Revenue, respondent herein, determined that petitioner was carrying on a unitary business within and without the state of Minnesota and that its income was apportionable to Minnesota under the three-factor formula prescribed in Minnesota Statutes 290.19, subdivision 1(2). On the basis of that deter-

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mination, the Commissioner's order assessed additional income taxes against petitioner in the amount of $269,505.67 for the tax years 1955 through 1967. Petitioner appealed from that order to the Minnesota Tax Court, asserting that it was not carrying on a unitary business within and without the state of Minnesota, but was operating a separate business (Powers Dry Goods division) wholly within the state of Minnesota. Petitioner further contended that even if it were carrying on a unitary business within and without the state of Minnesota, the apportionment of its net income to Minnesota by the three-factor formula violated the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

The Minnesota Tax Court determined that petitioner was carrying on a unitary business within and without the state of Minnesota, and affirmed the Commissioner's order apportioning petitioner's income to Minnesota under the three-factor formula. The Minnesota Tax Court did not rule on petitioner's contention that the apportionment of its income to Minnesota by the three-factor formula contravened the Fourteenth Amendment. See Petition, Appendix B.

On certiorari, the Minnesota Supreme Court affirmed the decision of the Minnesota Tax Court without opinion. See Petition, Appendix A.

ARGUMENT

As is indicated in the foregoing Statement of the Case, and confirmed in the petition herein (at page 7, lines 8 through 19), there were originally two issues in this suit:

(1) Was petitioner Associated Dry Goods Corporation carrying on a unitary business within and without the state of Minnesota?

(2) If petitioner was carrying on a unitary business within and without the state of Minnesota, is the apportionment of its net income to Minnesota by the three-factor formula violative of the equal protection or due process clause of the Fourteenth Amendment?

Petitioner has abandoned the second issue, leaving only the first, which is the issue that was dealt with and decided by the Minnesota Tax Court, and affirmed by the Minnesota Supreme Court.

The leading and model case on this issue is *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S.Ct. 701 (1942). In that case this Court held that California could properly treat the taxpayer's business as a "unitary business" where it operated wholesale distributing houses in seven states including California and maintained a central buying division. Inasmuch as there were substantially more unitary aspects to petitioner's business than were present in the *Butler Bros.* case,[1] there is no substantial federal issue presented in this case, and the *Butler Bros.* decision provides a clear statement of the applicable law.

The question whether petitioner was carrying on a unitary business within and without the state of Minnesota is essentially a question of fact to be determined by an examination of all of the relevant aspects of petitioner's business opera-

[1] See Findings of Fact, Petition, Appendix B, pp. A-3 thru A-8.

tions. The Minnesota Tax Court made such an examination, and on the basis of that examination and the applicable judicial precedents, including the *Butler Bros.* case, concluded that petitioner was carrying on a unitary business within and without the state of Minnesota. See Petition, Appendix B.

The Tax Court recognized that petitioner's "various divisions operate separately and apart from one another", that "each division tends to run autonomously in its day-to-day operations", and that "the divisions . . . are separate or nonunitary in that each division operates as though it were a separate company. Each division appears to be self-sufficient". (The same was true of the seven wholesale houses in *Butler Bros. v. McColgan,* supra.)[2] But notwithstanding these "nonunitary" aspects, the Tax Court concluded on the basis of the entire evidence that the various divisions of petitioner contribute to the success of the operations of one another, and that petitioner was carrying on a unitary business within and without the state of Minnesota.

It has long been established that this Court will not review a decision of a state court upon a question of fact that is supported by substantial evidence,[3] and the decision that peti-

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[2] It is inherent in the nature of the merchandising business that each store or outlet will "operate separately and apart from one another", and will "run autonomously its day-to-day operations". Such operating separateness and autonomy is in no way inconsistent with a merchandising business being a unitary business. *Butler Bros. v. McColgan,* supra; *Maurice L. Rohtschild & Co. v. Commissioner of Taxation,* 270 Minn. 245, 133 N.W.2d 524 (1965); *Walgreen Company v. Commissioner of Taxation,* 258 Minn. 522, 104 N.W.2d 714 (1960), appeal dismissed, 365 U.S. 767, 81 S.Ct. 912; *Western Auto Supply Co. v. Commissioner of Taxation,* 245 Minn. 346, 71 N.W.2d 797 (1955).

[3] *General Motors Corp. v. Washington,* 377 U.S. 436, 441-442, 84 S.Ct. 1564, 1568 (1964); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160, 73 S.Ct. 204, 206 (1952); *Grayson v. Harris,* 267 U.S. 352, 357-358, 45 S.Ct. 317, 319 (1925); *Pure Oil Co. v. Minnesota,* 248 U.S. 158, 164, 39 S.Ct. 35, 38 (1918).

tioner was carrying on a unitary business within and without the state of Minnesota is essentially such a decision.

Petitioner recognizes that this is not a reviewable question, stating: "Petitioner is not asking this Court to review the evidence before the Minnesota Tax Court to determine whether or not Petitioner's enterprise is unitary or non-unitary". (Petition, p. 9.)

However, after making that clear disclaimer, petitioner immediately proceeds to ignore it and to direct the entire thrust of its argument to the contention that it was not carrying on a unitary business within and without the state of Minnesota.

We submit that a re-examination of the evidence, and a redetermination of the question whether petitioner's business was unitary, does not present a substantial federal question that warrants the attention of this Court. This is particularly true in light of the clear statement of the applicable law in *Butler Bros. v. McColgan*, supra, which governs this case.

We therefore respectfully urge that the petition for certiorari herein be denied.

Respectfully submitted,

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